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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TIOGA PINES LIVING CENTER, INC., COMMUNICARE OF INDIANA, INC., D/B/A AMERICAN VILLAGE RETIREMENT COMMUNITY, BLOOMINGTON CONVALESCENT CENTER, INC., MEADOW HEIGHTS NURSING CENTER, INC., D/B/A LINCOLN HILLS OF NEW ALBANY, ET AL.,

Petitioners,

v.

INDIANA STATE BOARD OF PUBLIC WELFARE, INDIANA DEPARTMENT OF PUBLIC WELFARE, SUZANNE MAGNANT, in her capacity as ADMINISTRATOR OF INDIANA DEPARTMENT OF PUBLIC WELFARE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITIONERS' REPLY MEMORANDUM

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I. INTRODUCTION

The issue framed by the Petition for Certiorari, but ignored by respondents, is whether federal law means one thing in the state courts and another thing in the federal courts. Any objective reading of the federal decisions applying the Boren Amendment reveals that the Indiana Supreme Court decision directly conflicts with every federal court decision—including this Court's decision in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)—interpreting and applying the federal law. The existence and enforcement of federal rights ought not depend on whether a litigant seeks relief in state or federal court, but only on the terms of Congress' statutory mandate. State courts should be required to afford at least as much deference to the decisions of federal courts on questions of federal law as the federal courts owe to state courts on questions of state law.

Contrary to the impression created by respondents, the outcome of this case does not depend on whether petitioners are seeking damages. First, the Indiana Supreme Court specifically stated that its decision on the federal claims had nothing to do with any damages claims. (Pet. A-21.) Second, petitioners continue to be paid under the Medicaid system at issue in this case (the 1983 system). Respondents' attempt to replace the 1983 system with a new, more restrictive, system (the 1991 system) was enjoined and the court ordered that nursing homes be paid under the 1983 system.[1]

Respondents' arguments conceal the high stakes at issue. If this Court denies review, states, like Indiana here, will be able to divest courts of jurisdiction to adjudicate federal Boren Amendment claims through the manipulation of administrative and

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[1] The approved Indiana State Medicaid Plan has never been amended to include the changes proposed by the 1991 system. In fact, there are two additional cases challenging specific aspects of the 1983 system in active litigation. Both cases seek injunctive relief. *Indiana Ass'n of Homes for the Aged, Inc.* v. *Indiana Office of Medicaid Policy & Planning*, No. IP 93-965C (S.D. Ind. 1993); *Indiana Health Care Ass'n* v. *Sullivan*, No. IP 93-1496C (S.D. Ind. 1993).

judicial procedures which, while facially neutral, preclude judicial review of patently unlawful conduct. Petitioners have diligently pursued their federal claims in every available forum, only to have respondents argue at every turn that review should be denied.

At the outset of this case, petitioners obtained an injunction against the 1983 system which required the state to escrow for petitioners' benefit approximately $4,000,000 per month. Even under respondent's erroneous theories, the injunction would have preserved the court's power to afford petitioners relief. Yet, in the state court of appeals respondents argued, and the court agreed, that the injunction should be vacated because petitioners had an adequate remedy at law in damages.[2] Then, shortly before trial on the merits, respondents attempted to replace the 1983 System with the more restrictive 1991 system.[3] Respondents then argued before the Indiana Supreme Court, as they do before this Court, that petitioners' claims for damages could not be heard. Br. of Appellants at 81, *Indiana State Bd. of Pub. Welfare* v. *Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935 (Ind. 1993). Similarly, when prospective review of the federal claims was sought in federal court, respondents argued for abstention on the basis that "the state courts provide the best forum for adjudicating the entire underlying dispute because the state courts can consider damage claims." Defs.' Mem. of Law at 18,

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[2] Specifically, respondents stated that petitioners "plainly have an adequate remedy at law for any underfunding they may incur between the entry of the preliminary injunction and the final judgment in the form of compensatory payments that can be awarded after a trial on the merits of their claims." Br. of Appellants at 34, *Indiana State Bd. of Pub. Welfare* v. *Tioga Pines Living Ctr., Inc.*, 575 N.E.2d 303 (Ind. Ct. App. 1991).

[3] The trial court characterized respondents' motives as an attempt to "moot" petitioners' claims and to "deprive (the) court of jurisdiction" to adjudicate those claims. Order at 11, *Tioga Pines Living Ctr., Inc.* v. *Indiana State Bd. of Pub. Welfare*, No. 30C01-9002-CP-125 (Hancock Cir. Ct. May 14, 1991). The court also found that respondents adopted the 1991 system solely for "budgetary" reasons and intended for the system to act as a "firewall" against further liability created by the court's previous orders. *Id.* at 5 and 9.

Indiana Health Care Ass'n v. *Magnant*, No. IP 90-1573C (S.D. Ind. 1990). The federal court agreed and abstained, stating that "only the state courts can resolve . . . the damages claim." Order at 18, *Magnant*, No. IP 90-1573C.

Respondents would have this Court endorse a judicial "catch-22," where injunctive relief under federal law is denied because of the availability of damages, and damages are denied because only injunctive relief is available under federal law. If this Court denies review, states will be able to avoid compliance with federal law by simply changing their policies on the eve of judgment and then argue that no court has jurisdiction to adjudicate such retrospective federal claims.

When Congress adopted the Boren Amendment it did not intend to permit states to defeat the federal guarantees of reasonable payment and quality care through the unilateral act of repealing and replacing the illegal program, or by delaying adjudication of alleged violations, or by taking blatantly contradictory positions before the courts. This Court should make clear that respondents' conduct does not deprive courts of the ability to vindicate petitioners' federal rights. *Cf. City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982).

II. THE PETITION FOR CERTIORARI PRESENTS A FEDERAL QUESTION.

Respondents argue that no federal question is presented because "[t]he claim for damages cannot be pursued under § 1983, and thus there is no jurisdictional basis for petitioners' attempt to enforce the Boren Amendment with respect to that claim" (footnote omitted). (Br. in Opp'n pp.5-6.) Respondents' argument erroneously presumes that a federal question exists *only* if petitioners' federal claims can be adjudicated in the state court pursuant to jurisdiction conferred by 42 U.S.C. § 1983.

Respondents are wrong. "State courts have jurisdiction over federal causes of action not because it is 'conferred' upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising

under the laws of foreign sovereigns, . . . ; but because 'the laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are . . . .' " *Tafflin* v. *Levitt*, 493 U.S. 455, 469 (1990) (Scalia, J., concurring) (citations omitted).[4]

The Boren Amendment creates the federal rights at issue in this case, establishes plaintiffs' standing, defines the elements of petitioners' cause of action and delineates the relief to which petitioners' are entitled on proper proof. *Wilder*, 496 U.S. 498, *Cf. Weinberger* v. *Salfi*, 422 U.S. 749, 760-61 (1975). The Indiana Supreme Court decided that respondents did not violate the federal Boren Amendment. That decision raises a federal question. The nature and scope of the rights conferred by the federal Boren Amendment, and the responsibility of the state courts to adjudicate alleged violations of federal law and to enforce all of the rights conferred by the federal statute, are federal questions whether the power to enforce federal rights is conferred on the

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[4] Federal questions almost identical to those at issue here routinely arise in the state courts—and are reviewed by this Court—under a wide variety of federal statutes other than 42 U.S.C. § 1983. See *Testa* v. *Katt*, 330 U.S. 386 (1947) (Federal Emergency Price Control Act); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697 (1945) (Fair Labor Standards Act); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) (Jones Act); *Merchants' Nat'l Bank* v. *City of Richmond*, 256 U.S. 635 (1921) (Revenue Code); *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment); *Rogers* v. *Alabama*, 192 U.S. 226 (1904) (Fourteenth Amendment); *Claflin* v. *Houseman*, 93 U.S. 130 (1876) (Bankruptcy Act).

"[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin*, 493 U.S. at 458. There is no question that the Indiana courts are "competent" to and routinely do adjudicate statutory claims such as those at issue here. *Claflin*, 93 U.S. at 136, *Gentry* v. *United Slate, Tile & Constr. Roofers*, 319 N.E.2d 159 (Ind. Ct. App. 1974) (National Labor Relations Act); *Lakin* v. *Consolidated Rail Corp.*, 545 N.E.2nd 843 (Ind. Ct. App. 1989) (Federal Employer's Liability Act); *McBride* v. *Cox*, 567 N.E.2nd 130 (Ind. Ct. App. 1991) (Fair Labor Standards Act).

state courts by a federal law, such as section 1983, or by a state law.[5]

III. THE INDIANA SUPREME COURT DID NOT ADJUDICATE PETITIONERS' FEDERAL PROCEDURAL CLAIM.

A. The Record Below Shows the Indiana Supreme Court Completely Ignored the Procedural Claim.

This Court determines whether federal law forms the basis for a judgment by examining the record below. *See, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1037-44 (1983); *Street* v. *New York*, 394 U.S. 576, 582-84 (1969); *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278, 281-82 (1961); *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185 (1945); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67-69 (1928); *Rogers*, 192 U.S. at 230-31. The Indiana Supreme Court's opinion refutes respondents' speculation that its ruling "necessarily rests on a decision that the procedural claim was either irrelevant to the damages claim or unsubstantiated." (Br. in Opp'n pp.6-7.)

The Indiana Supreme Court stated: "because we determine that the State's methodology was not illegal, *we need not address* whether the trial court had jurisdiction to award damages or whether the trial court used an erroneous measure of damages" (emphasis added). (Pet. A-21.) Further, the court expressly refused to decide the procedural findings claim. The court

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[5] Ultimately, respondents' heavy-handed manipulation of the record collapses on itself. One of the principal issues that *respondents* asked the Indiana Supreme Court to decide was "[w]hether the trial court erred in finding that the State had failed to make annual 'findings' about the adequacy of rates, pursuant to a federal Medicaid regulation" *See* Br. of Appellants, App. J, at J-3; Br. of Appellees and Cross-Appellants, App. J, at J-6, *Tioga Pines*, 622 N.E.2d 935 (Ind. 1993). In this Court, respondents state that "[t]he Indiana Supreme Court addressed *in detail* the major arguments presented by the State's appeal" (emphasis added). (Br. in Opp'n p.7.) In the next sentence, however, respondents admit that the Indiana Supreme Court opinion does not even mention the findings issue. (*Id.*) Obviously, one of respondents' statements is wrong.

defined the scope of its review of the trial court's ruling, stating, albeit incorrectly, that "the illegality upon which the [trial court's] judgment is based is clearly supplantive." (Pet. A-12.) In actuality, the trial court's judgment was based upon extensive, uncontroverted and uncontested evidence that the state violated the Boren Amendment funding requirements as well as the statute's supplantive requirements. (See Pet. pp.8-13.)

The decisions of this Court refute respondents' belief that a state court may ignore a dispositive federal question because the issue is considered "immaterial" or "unnecessary." This Court has held:

> While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is manifestly necessary to see that that court cannot, by omitting to base upon the basic questions of fact, deprive a litigant of the benefit of a Federal right . . . .

Carlson v. Washington, 234 U.S. 103, 108 (1914). See Brooklyn Sav. Bank, 354 U.S. at 703; Lawrence v. State Tax Comm'n, 286 U.S. 276, 285 (1932); Wertheimer, Nat'l Bank, 250 U.S. at 238.

B. Respondents' Characterization of the State Court Decision Demonstrates the Need for Review by This Court.

Even if respondents correctly state that the Indiana Supreme Court decision "necessarily rests on a decision that the procedural claim was . . . irrelevant to the damages claim," (Br. in Opp'n p.9), review should be granted because such a decision would conflict with decisions of the federal courts.

Illegally adopted regulations are void ab initio. Thus, federal and state courts have long held that monetary relief is appropriate when new regulations denying or restricting government benefits are adopted in violation of procedural requirements or

supplantive limitations.[6] The measure of damages is the amount that would have been paid had the multiwall regulations not been adopted. See Wisconsin Hosp. Ass'n v. Kreviz, 850 F.2d 683, 698 (7th Cir. 1987) (Board Amendment); Mason Gen. Hosp. v. Department of Health & Human Servs., 908 F.2d 1550, 1555 (6th Cir. 1987) (Medicare payments); Arlington Memorial Hosp. v. Heckler, 720 F.2d 545, 544 (3d Cir. 1984) (same), cert. denied, 474 U.S. 863 (1985); Memorial Medical Ctr. v. Heckler, 708 F.2d 595, 595 (8th Cir. 1982) (same); Michigan Hosp. Ass'n v. Babcock, 730 F. Supp. 729, 704 (W.D. Mich. 1990) (Board Amendment); Washington State Hosp. Ass'n v. Washington, No. C80-643D, Medicare & Medicaid Guide (CCH) ¶ 36,325 at 14,348 (W.D. Wash. May 18, 1987) (Board Amendment). State courts adjudicating federal Board Amendment claims routinely afford monetary relief. See Volk v. Oregon, 777 P.2d 628, 664 (Or. App. 1990); New England Memorial Hosp. v. Rate Setting Comm'n, 514 N.E.2d 740, 742 (Mass. 1987).[7]

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[6] Respondents contradict themselves yet again. Respondents argued at an earlier stage in this case that retrospective payments would be available if petitioners prevailed. Respondents predicated this argument squarely on the holding of two federal courts. See Br. of Appellants at 33, Troba Pines, 572 N.E.2d 603, citing, Hillhaven Corp. v. Wisconsin Dep't of Health & Social Servs., 733 F.2d 1554, 1558 (7th Cir. 1984); Coalition of Michigan Nursing Homes, Inc. v. Dempsey, 732 F. Supp. 421, 424 (E.D. Mich. 1985). The Indiana Court of Appeals agreed with respondents and held—consistent with the federal cases—that monetary relief was available. 572 N.E.2d 603. Respondents now make the inconsistent argument that petitioners' ineligible reliance on rulings of the state appellate courts in earlier stages of the litigation can be used to preclude application of federal rights. See MMCP v. Madonna, 327 U.S. 444 (1928).

[7] In similar circumstances some courts have refused to characterize the relief sought by petitioners here as "damages." See Ohio Hosp. Ass'n v. Ohio Dep't of Human Servs., 572 N.E.2d 682, 700 (Ohio 1991) (order to reimburse Medicaid providers for amounts multiwall withheld is not an award of money damages, but equitable relief); cert. denied, 112 S. Ct. 1483 (1992); citing Bowen v. Massachusetts, 487 U.S. 879 (1988); Maryland Dep't of Human Resources v. Department of Health & Human Servs., 763 F.2d 1441 (D.C. Cir. 1985).

IV. THE SUBSTANTIVE RULING OF THE INDIANA COURT CONFLICTS WITH DECISIONS OF THE FEDERAL COURTS.[8]

Respondents' claim that the deferential standard of review used by the Indiana Supreme Court is consistent with federal authority, (Br. in Opp'n p.9,) ignores both Ninth and the body of federal case law holding that such deference is appropriate only if a state has actually made the findings required by the Boren Amendment. (See Pet. pp.19-20.)[9] The two cases cited by respondents are inapplicable. In Lall v. Mahoney, 862 F.2d 527, 527 (7th Cir. 1988) there was no claim that the state failed to make findings and thus no dispute as to the appropriate standard of review. In Pinnacle Nursing Home v. Axelrod, 858 F.2d 1308 (2d Cir. 1988), the state had made some findings, but the findings were inadequate under federal law. Federal courts agree that a deferential standard of review is inappropriate where, as here, a court determines that a state made no findings at all. (See Pet. pp.19-20.)

Respondents next argue that the burden of proof imposed on petitioners by the state supreme court, i.e., to prove "that there was no nexus between the costs of operating efficient and economical nursing facilities and the rates under the State's plan," (Pet. A-8), "was directly derived from federal decisions," (Br. in Opp'n p.9), citing Pinnacle, 858 F.2d at 1314. In fact, the Pinnacle court—as do other federal courts—held that the statute places an affirmative burden squarely on states, not providers:

> [T]he state must make findings which establish a nexus between the costs of operating efficient and economic

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[8] The Petition for Certiorari addresses in detail many of respondents' arguments. Pursuant to Rule 15.2, petitioners, reply brief addresses only those arguments first raised in respondents' brief in opposition.

[9] Respondents claim that the cases cited in the petition are distinguishable because none involved a claim for damages. (Br. in Opp'n p.9.) Respondents provide no rationale for why this distinction is relevant to the appropriate standard of review.

> uniting interests and the proposed reimbursement rates under the state plan. While the method used by a state in formulating these findings admits some flexibility, it is the absolute necessity that such findings be made. Wilder, 110 S. Ct. at 2519.

Id. at 1314 (emphasis added).

Respondents also assert that "there is no conflict between the Indiana Supreme Court and any federal statutes concerning duality of care," since the evidence regarding duality "consisted solely of testimony of a person who had not studied Indiana nursing homes." (emphasis added). (Br. in Opp'n p.10.) Respondents' statement is false in two respects. First, the dispositive fact—which respondents do not deny—is that the Indiana Supreme Court completely ignored both the evidence regarding duality of care and the statute's express statement that rates are reasonable and adequate only if they pay the costs of delivering care "in conformity with . . . State and Federal laws, regulations, and duality and safety standards . . . " 42 U.S.C. § 1396a(a)(13)(A). Second, the trial court made detailed findings, based on evidence from several sources—including state officials and data from the state's files—that the rate-setting system violated federal law because duality care could not be provided at the rates paid by the Indiana Medicaid program. (See Pet. pp.55-53.)

Finally, respondents argue that because the court below found that one of the components of the rate system was adequate, "then the conclusion was inescapable that the system [as a whole] provided adequate reimbursement . . . . " (Br. in Opp'n p.11.) This statement contradicts settled federal law. The legality of a Medicaid rate under federal law, as respondents themselves signed to the Indiana Supreme Court, is determined by whether the rate as a whole is adequate, not by examining the reasonableness of isolated components in the rate-setting system. (See Pet. p.54.) Properly applying federal law, the trial court below ruled that "the entire reimbursement system" violates the Boren Amendment "for several reasons." (Id.)

In [illegible] outcome determinative respects the state court used decisional standards that conflict with settled principles applied by the federal courts. The statutory rights conferred by Congress are not so ephemeral that their existence should depend solely on whether an enforcement action is brought in state or federal court.

V CONCLUSION

For the foregoing reasons, petitioners respectfully request that certiorari be granted in this case.

Respectfully submitted,

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